In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1220

HOWARD T. JENSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1943, after a trial by jury, petitioner was convicted in the United States District Court for the District of Utah on a charge of violating the Federal Kidnaping Act (18 U. S. C. 408a) and he was sentenced to imprisonment for ten years (R. 11–14). In October, 1946, he filed a motion in the convicting court to vacate the judgment and sentence, alleging that the indictment failed to allege all the necessary elements of the offense, and that the proof at the trial failed to establish that the officers whom he was alleged to have kid-

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naped were transported across state lines (R. 1–10). The motion was denied on October 31, 1946 (R. 15).

On December 19, 1946, petitioner filed a petition for rehearing of his motion to vacate the judgment (R. 15–23). The petition was denied on the same date (R. 23).

On December 27, 1946, petitioner filed a notice of appeal from the order of October 31, 1946 (R. 24). On motion of the United States Attorney (R. 29–30), the circuit court of appeals dismissed the appeal on the ground that it had not been taken within the 10-day period prescribed by Rule 37 (a) (2) of the Federal Rules of Criminal Procedure (R. 34; 160 F. 2d 104).

Petitioner seeks review of the order of the circuit court of appeals dismissing his appeal. He contends that, under the decision of this Court in *United States ex rel. Coy* v. *United States,* 316 U. S. 342, he had three months within which to appeal to the circuit court of appeals from the order of the district court denying his motion to vacate the judgment and sentence. He fails to realize that Rule 37 of the Federal Rules of Criminal Procedure remedied the *casus omissus* in Rule III of the old Criminal Appeals Rules referred to in the *Coy* decision, 316 U. S. at p. 345. Rule III of the old Criminal Appeals Rules provided for an appeal within 5 days "after entry of judgment of conviction." Rule 37 (a) (2) of

the Federal Rules of Criminal Procedure provides for an appeal "within ten days after entry of the judgment or order appealed from." Since, under the *Coy* decision, an order on a motion to vacate a judgment of conviction is an order in the criminal case, the circuit court of appeals was clearly correct in holding that petitioner's time to appeal to that court was governed by the 10-day period fixed in Rule 37 (a) (2) of the Federal Rules of Criminal Procedure.[1]

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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THERON L. CAUDLE,
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JUNE 1947.

[1] The petition for rehearing was filed more than a month after the time to appeal had expired, at a term subsequent to that at which the motion to vacate was denied (28 U. S. C. 190). It could not, therefore, serve to extend petitioner's time to appeal. See Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Sec. 354.

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